SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1957

No. 839

MILMAR ESTATE, INC., WILLIAM MILLER, AL BIERMAN and AL KEVELSON,

Petitioners,

vs.

SAMUEL MARCUS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted to review the denial by the Court of Appeals of the petitioner's motion to amend the mandate when the mandate is clear and certain?

2. Should the Court in the exercise of its sound judicial discretion issue a writ of certiorari to review the judgment of the Court of Appeals when the petitioners failed to file their application for such writ within the time allowed by law?

3. Even if the application for the writ of certiorari was timely filed are there presented under the rules and applicable law special and important reasons for this Court to exercise its sound judicial discretion to grant the writ?

Counter-Statement of the Case

This action was commenced in the District Court for the District of New Jersey. After trial the court filed an opinion (140 F. Supp. 66; Petition for Certiorari pp. 25-53) and entered final judgment on October 19, 1956 (R2022a to R2025a; Petition for Certiorari pp. 54-57). Samuel Marcus the respondent here appealed from that judgment to the United States Court of Appeals for the Third Circuit. After hearing argument on all issues on May 7, 1957 the Court, on July 3, 1957, filed an opinion (246 F. 2d 200; Petition for Certiorari pp. 58-63) which read in part as follows:

> "Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While the normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them, *B. J. Van Ingen & Co.* v. *Connolly, Supra*, at 744, the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.
>
> "The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.
>
> "Accordingly, the judgment will be vacated and the cause remanded with instructions to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims."

That court's judgment, which was filed the same day, ordered that the judgment of the District Court be and the same was thereby vacated, and remanded the cause with instructions to dismiss the complaint (Petition for Certiorari p. 64). The court's mandate issued on July 31, 1957. This read, in part:

> "ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby vacated, with costs, and the cause remanded with instructions to dismiss the complaint." (Petition for Certiorari, p. 65).

Thereafter, nothing was done by the petitioners to seek further review. They did not seek a rehearing in the Court of Appeals. They did not file an appeal to this court. They did not petition this court for a writ of certiorari. They did not move to extend the time within which such a writ could be applied for. Nothing was done by the petitioners until the matter came before the District Court on October 28, 1957 for proceedings on the mandate. This appearance before the District Court was pursuant to a motion of the respondent Marcus, seeking the entry of "a final decree upon the law as laid down in the opinion of the United States Court of Appeals for the Third Circuit and in conformity with the * * *" mandate of that court (R. Mot. Ct. App. Appendix p. A-2.)

At the hearing of said motion the Court observed:

> "* * * they decided the court had no jurisdiction because it was not in truth and in fact an interpleader action. That put the thing right out of court lock, stock and barrel." (Petition for Certiorari, p. 67).
>
> "Now they do say that the thing is to be dismissed. My view of it would be that the whole litigation is dismissed." (Petition for Certiorari, p. 79).

For the first time the petitioners urged that the mandate issued by the Court of Appeals on July 31, 1957 was ambiguous. Although the District Court considered the mandate clear, nevertheless it permitted the petitioners an opportunity to urge their contention before the Court of Appeals.

Petitioners did not take advantage of this opportunity until December 2, 1957 when they filed a Notice of Motion in the Court of Appeals seeking an amendment of the mandate (R. Pr. Ct. App.; R. Mot. Ct. App.). The court disposed of the motion on briefs, without oral argument, by entering an order on December 26, 1957 denying the motion. (Petition for Certiorari, pp. 80-81). This order contained the following introductory paragraphs:

> "Upon consideration of the motion of appellees herein for an order amending and recalling this court's mandate of July 31, 1957; and
>
> "It still appearing to the satisfaction of this court that an interpleader complaint, the essential averments of which constituted an imposition upon the jurisdiction of the District Court, was the basis upon which that court took cognizance of and adjudicated the several matters covered by its final judgment from which appeal was taken to this court."

The present petition was not filed until March 5, 1958.

ARGUMENT IN OPPOSITION TO THE PETITION

POINT I

The petition should be dismissed as being an untimely attempt to seek review of the judgment of July 3, 1957, which vacated the judgment of the District Court and dismissed the interpleader complaint.

The entire petition of the petitioners deals with a single point: The Court of Appeals was in error when it "dismissed" the post-interpleader claims. If such a decision was reached by the Court of Appeals, and respondent states that it was, it was reached on July 3, 1957, and incorporated in the mandate issued on July 31, 1957. The applicable statute of the United States reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court for good cause shown, may extend the time for applying for a Writ of Certiorari, for a period not exceeding sixty days". (28 U.S.C. Sec. 2101(c)).

The writ must be denied if applied for too late. *Sabin* v. *Levorsen*, 320 U. S. 792 (1943); *Cullotta* v. *Ragen*, 321 U. S. 794 (1944). The statute is to be construed strictly and under its terms petitioners' time for taking the present action expired October 3, 1957. In an attempt to circumvent this statutory provision the petitioners state that they are seeking review of the denial of their motion for amendment of the mandate. They do so by averring that the order of the Court of Appeals of December 26, 1957 denying their motion seeking an amendment of the mandate is in effect an amendment of the mandate, and that as a con-

sequence thereof the statutory time commences to run from the date of the aforesaid order and not from July 3, 1957, the date of judgment. This is an erroneous contention.

The Order of December 26, 1957 was practically a word-for-word repetition of the key paragraph in the opinion of the Court of Appeals filed in this matter. It did no more than reiterate what had been said before and it did not amend anything.

Chief Justice Vinson, speaking for this court in *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), said:

> "* * * The time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged. Thus, the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court in its second order has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." (344 U. S. at 211-212).

Applying the standards above to the case *sub judice* shows the petitioners' contention to be unsound, for the order of December 26, 1957 did not change any matter of substance, nor did it resolve any genuine ambiguity. In fact it did not change even an immaterial matter, nor did it disturb or revise any legal rights, but maintained the *status quo*. It must be concluded that the petitioners are out of time.

The petitioners on Pages 18 and 19 of the Petition assert that the case of *National Biscuit Company* v. *Kellogg Co.*, 96 F. 2d 873 (D. C. A. 3, 1938), *Cert. Granted* 304 U. S. 586, *rev'd.* 305 U. S. 111 (1938), is a case similar to the one at bar and that under that case this court may grant certiorari here. An examination of the various opinions filed in the *National Biscuit* matter and related papers reveals the following to be the true state of facts. On January 5, 1938 the District Court entered its final judgment using the exact words of the mandate of the Court of Appeals. Subsequently the National Biscuit Company petitioned the Court of Appeals for a clarification of the mandate. The Circuit Court said that although it was perfectly clear what the mandate meant, they would recall the mandate, since its language was poor. They did so and reworded the mandate, being careful to indicate that they were not amending the previous mandate. A petition for certiorari was filed and certiorari was granted. This Court in its opinion (305 U. S. 111) indicated the certiorari was granted because subsequent to the date of the first denial of certiorari (302 U. S. 654) the British Privy Council had decided a case between the same two litigants covering the same points of law and involving the same facts in a manner contrary to the existing decision of the Court of Appeals. There was presented an important problem of comity between the United States and Canada, and this court asserted its prerogative in an effort to harmonize the law of Canada and that of the United States. Certiorari was granted to settle this important problem and not to review the rewording of the mandate. The case at bar does not present a problem of special significance which would justify granting certiorari.

Petitioners cite *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948) for the proposition that certiorari will be granted even though the petitioning party has failed to

move for timely amendment of the mandate. That this is not correct is shown by the following from Justice JACKSON's opinion therein:

> "The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. * * * Plaintiff accepted its advantages and brings her case to this Court, *not on the proposition that amendment of the mandate has been improperly refused*, but on the ground that the mandate should be disregarded. Such a position cannot be sustained." (304 U. S. at pp. 306-307, emphasis added.)

The present matter is being brought to this Court on the proposition that amendment of the mandate was improperly refused and that question was never discussed by this Court in the cited case.

Ex Parte Morgan, 114 U. S. 174 (1885) also cited by the petitioners deals with mandamus. It contains nothing of importance to the question presented here.

POINT II

Even if the petition for certiorari was timely filed, there is not presented any special and important reason which calls for the granting of a writ of certiorari by this Court.

Rule 19 of the rules of this Court states that "A review on writ of certiorari is not a matter of right, but of sound, judicial discretion, and will be granted only when there are special and important reasons therefor * * *." The respondent asserts that there is no special and important reason which justifies certiorari under the rule. All of the points raised in the petition are in reality facets of one central theme: *i.e.* the assertion that the Court of Appeals erred when it ordered the entire judgment vacated and

when it refused to allow judgment to be entered in favor of the petitioners on various crossclaims and counterclaims filed in this action. The petitioners assert that this action of the Court of Appeals is a deviation from previous rulings of other courts of appeal, that this action violates the rule established by this Court in *Wetmore* v. *Rymer*, 169 U. S. 115; and finally that this action is so improper and constitutes such a deviation from the accepted and usual course of judicial proceedings that it calls for the intervention of this Court. The respondent avers that to accept these claims as valid would negate the true keystone of the opinion of the Court of Appeals. That court clearly indicated by its opinion that the petitioners had imposed upon the District Court, that their suit was a misuse of the interpleader statute based on pretense and sham. For that reason the Court of Appeals determined that it would not consider the other matters in issue raised by the various crossclaims and counterclaims and accordingly vacated the judgment of the District Court which had decided these issues.

None of the cases cited by the petitioners on this point contain the type of castigation of the motives of plaintiffs that the present matter does. In none of them does the court indicate that the complaint is being dismissed because the suit was instituted in bad faith, as here.

In *Haberman* v. *Equitable Life Assurance Society of U. S.*, 224 F. 2d 401, 409 (C. A. 5, 1955) the court stated by way of dicta that even if a complaint be dismissed (and in the case it was not so dismissed), a compulsory counterclaim can stand if it is supported by a proper ground of federal jurisdiction. There is no mention or hint that the case is one involving bad faith or an imposition on the court. In *Isenberg* v. *Biddle*, 125 F. 2d 741 (App., D. C., 1941) the plaintiff's complaint was dismissed for lack of jurisdiction and summary judgment was granted on a

counterclaim interposed by the defendant. On appeal the judgment on the counterclaim was allowed to stand. Again there was no hint that the victorious party had been guilty of bad faith or fraud. In fact, it appears that the plaintiff had attempted to defraud the federal government and the decision of the court allowed the innocent party recovery while dismissing the complaint of the wrongdoer. In *Lion Mfg. Corporation* v. *Chicago Flexible Shaft Co.*, 106 F. 2d 930 (C. A. 7, 1939), the plaintiff's complaint was dismissed because it failed to state a cause of action arising under the patent laws. The defendant's counterclaim was allowed to stand, since it did state a cause of action arising under the patent laws. Again we find no mention of fraud, bad faith, or imposition. In *Vidal* v. *South American Securities Co.*, 276 Fed. 855, 874-875 (C. C. A. 2, 1922) a similar situation exists, the complaint was dismissed on jurisdictional grounds, but the court held that the counterclaim would stand. Likewise in the other cases cited. Again it must be stated that in none of these cases were the facts similar to the matter at bar. No one in these cases was accused of sham and pretense and no one was accused of imposing on the federal courts. The cases are therefore clearly distinguishable and not authority in this matter.

The petitioners' reliance on *Wetmore* v. *Rymer*, *supra*, is not well founded. In the present matter the Court of Appeals clearly indicated it realized that the decisions on the counterclaims and crossclaims were in existence and they clearly indicated to the respondent and the District Court below that they had vacated the entire judgment of the District Court. The Court said in its opinion, in commenting on these claims:

> "* * * This four year delay and the failure of either defendant, even then, to claim the fund as paid into court strongly indicate that something very different from what had been alleged in the interpleader com-

> plaint was actually in controversy. Indeed the pleadings subsequent to the complaint and the evidence introduced by the parties disclosed that the matters in controversy were the amount of stock Marcus had agreed to sell to Miller and Bierman and whether, *for reasons we need not consider*, Marcus was entitled to have the transactions set aside as fraudulent * * *." (Opinion of HASTIE, *C. J.*, Petition for Certiorari, p. 59; emphasis added.)

The words "for reasons we need not consider" were placed in the opinion by the court below to indicate that these other claims had been reviewed and were found to be tainted by the basic bad faith of the petitioners, and therefore the judgments thereon were vacated with the dismissal of the complaint. This is the articulate conclusion to oust the post-interpleader claims which the petitioners assert has never been made. (See Petition for Certiorari, p. 13.)

The mandate of the Court of Appeals was clear, precise and unambiguous. The Court of Appeals thought so, as witnessed by its denial of petitioners' motion of December 2, 1957. The District Court thought so, as witnessed by the statements of that court set out previously in this brief.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be deemed as being untimely filed and for the further reason that no special or important reason exists for the exercise of this Court's sound judicial discretion.

Respectfully submitted,

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